MAR 2 9 1968 SUPREME COURT, U. S.

NO. 742

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF MARYLAND, ET AL.,
Appellants

v.

W. WILLARD WIRTZ,
SECRETARY OF LABOR, ET AL.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief *amicus* in the instant case in support of the position of the Appellees, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the Appellees has been obtained. Consent of counsel for the State of Maryland, the State which brought this action and which has taken the lead in prosecuting it, and the State of Texas, the only State to file a separate brief of its own, has been sought. The State of Maryland has stated that it would not "actively oppose" the filing of a brief *amicus* by the AFL-CIO, but that it could not "consent" to

the filing of said brief without "consulting all of the other states [which] would present a time consuming problem." The State of Texas has given its consent.

INTEREST OF THE AFL-CIO

The American Federation of Labor and Congress of Industrial Organizations is a federation of 129 affiliated labor organizations with a total membership of approximately 14,000,000. The question presented here is whether that portion of the 1966 amendments to the Fair Labor Standards Act (Public Law 89-601, 80 Stat. 830, amending 29 USC 201 *et seq.*) which extends the benefits of that Act to certain employees of public schools and hospitals and similar institutions, is constitutional. Affiliates of the AFL-CIO represent a substantial number of employees affected by these amendments and the AFL-CIO was active in seeking to persuade the Congress to enact this broadened coverage. Indeed, as AFL-CIO President George Meany has stated, the Federation regards the 1966 amendments to the Act as "the greatest single victory in the war on poverty" and has set up machinery for a nationwide drive to secure their effective enforcement. In light of the above, we submit that the interest of the Federation in the outcome of this case is manifest.

THE ISSUE TO BE COVERED IN THE AFL-CIO'S BRIEF AMICUS

In the court below, the main burden of the Government's brief was that Congress has power under the Commerce Clause to pass a broad variety of legislation which has an effect on state activities. Given the varied interests of the United States, this is the natural position for the Government to take and it is our understanding that its brief to this Court will follow the same pattern. The AFL-CIO's

primary interest on the other hand is Congress's power to pass laws which affect the employment relation between the several States and their employees. And the accompanying brief, therefore, is addressed to this narrower concern. We believe that this approach puts the instant case in a somewhat different focus and that it would, therefore, be helpful to the Court to have the benefit of the Federation's views.

CONCLUSION

For the above-stated reasons, we respectfully urge the Court to grant this motion to file the accompanying brief *amicus* in the instant case in support of the position of the Appellees.

Respectfully submitted,

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March 1968

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae*.

The opinion below, jurisdiction, questions presented, and the constitutional and statutory provisions involved, are set out in the Appellees' brief.

The interest of the AFL-CIO is set out on p. iv of the foregoing motion for leave to file a brief as *amicus curiae*.

ARGUMENT

PRIOR DECISIONS OF THIS COURT DEMONSTRATE BEYOND QUESTION THAT THE 1966 AMENDMENTS TO THE FAIR LABOR STANDARDS ACT ARE CONSTITUTIONAL

The 1966 amendments to the Fair Labor Standards Act (Public Law 89-601, 80 Stat. 830 amending 29 U.S.C. 201 *et seq.*) extend the benefits of that Act to employees, who are not executives, administrators or professionals, of any:

> "... enterprise which has employees engaged in commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which . . . is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit)."

1. The declaration of policy in the Act establishes that one of the Congressional purposes in regulating labor relations to the extent of establishing minimum wages and hours was to prevent burdens and obstructions to commerce.[1] And *United States* v. *Darby*, 312 U.S. 100, 120 (1941), upholding the constitutionality of the Act, holds that this

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[1] "The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such

Congressional response to the problem of substandard working conditions is reasonably related to the end sought and, therefore, satisfies the first demand of the Commerce and Necessary and Proper clauses. *Cf. Wickard* v. *Filburn*, 317 U.S. 111, 129 (1942), *see also United States* v. *Carolene Products Co.* 304 U.S. 144, 152-154 (1938); Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91, 104-105 (1966).

Moreover, it is perfectly well settled that, under the commerce clause, Congress may, in order to insure the smooth and uninterrupted flow of goods in interstate commerce, regulate the labor relations of any employer whose activities depend, to any degree greater than *de minimis*, on goods which have moved across state lines and whose situation is representative of a significant group or class. As Chief Justice Hughes, speaking for this Court in *N.L.R.B.* v. *Jones & Laughlin*, 301 U.S. 1, 36-37 (1937), stated in upholding the constitutionality of the National Labor Relations Act:

> "The Congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental princi-

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labor conditions among the workers of the several states; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

> ple is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement'; to adopt measures 'to promote its growth and insure its safety'; 'to foster, protect, control and restrain.' That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." (Citations omitted.)

And as the Court added in *Polish National Alliance* v. *NLRB*, 322 U.S. 643, 648 (1944):

> "Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce."

See also NLRB v. Fainblatt, 306 U.S. 601, 606 (1939).

While the leading cases, such as *Darby* and *Jones & Laughlin*, which established Congressional authority over labor relations of so-called "intra-state" or "local" employers, dealt with manufacturers, there can be no doubt that the principles they establish apply to retailers and those whose primary function is to supply services to the public whether on a profit or nonprofit basis. *See NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963) (fuel oil retailer); *United States* v. *Riccardi*, 357 F2d 96 (2nd Cir. 1966) *cert. denied* 384 U.S. 942 (apartment house superin-

tendent); *NLRB* v. *Inglewood Park Cemetery Association* 355 F2d 448 (9th Cir. 1966) *cert. denied* 384 U.S. 951 (cemetery); *N.L.R.B. v. Stoller,* 207 F2d 305 (9th Cir., 1953) (dry cleaning establishment); *Butte Medical Properties d/b/a Medical Center Hospital,* 168 NLRB No. 52 (1967); *N.L.R.B.* v. *Central Dispensary & Emergency Hospital,* 145 F2d 852 (D.C. Cir. 1944) *cert. denied* 324 U.S. 847.[2] In light of these cases the fact that the employers here operate schools and hospitals places their relationship with their employees within the reach of a Congressional regulation, such as that challenged here, which is reasonably related to the prevention of burdens or obstructions to commerce between the states.

Certainly both logic and practical considerations support this conclusion, for labor strife at an enterprise receiving interstate goods can damage the public, and particularly those who make and move those goods, just as strife at a manufacturing plant can injure those who move or utilize

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[2] In *Central Dispensary & Emergency Hospital,* the Court of Appeals stated (145 F2d at 853):

> "Respondent's activities involve the sale of medical services and supplies for which it receives about $600,000 a year. It purchases from commercial houses material of the value of about $240,000 annually. It employs about 230 persons for nonprofessional services and maintenance work and 120 technical and professional employees. Such activities are trade and commerce and the fact that they are carried on by a charitable hospital is immaterial to a decision of this issue. In the case of *American Medical Association* v. *United States,* [130 F2d 233] this Court held that the sale of medical and hospital services for a fee has been considered as trade by English and American common law cases going back to 1793. In *Jordan* v. *Tashiro* [278 U.S. 123], the operation of a general hospital was said to be a 'business undertaking' and such activity was included within the meaning of the words trade and commerce as used in a treaty with Japan."

them. This point is reinforced by appreciation of the fact that public educational institutions will spend approximately 38 billion dollars in fiscal 1966-67 and public hospitals approximately 4 billion dollars (App. 11a). Much of this money will be spent for specialized goods—textbooks, teaching machines, desks, hospital beds, surgical equipment, etc. —which are not produced in every State. Thus, in effect, there are in this country large, interconnected health and education industries spanning state lines with the hospitals and schools as their focal points. In light of the size, importance and complexity of these industries, it is clear that the Commerce Clause must have the same scope when applied to them as it has been held to have when applied to other less pervasive and important industries.

2. The decisions of this Court establish that state actions, as well as private actions sanctioned by state law, which burden or obstruct interstate commerce may be regulated by Congress under the Commerce Clause. Indeed, in our review of the cases we have been unable to find even a single intimation by this Court which suggests that state activities may not be governed by an otherwise valid Congressional enactment under that clause. The leading case is *United States* v. *California*, 297 U.S. 175 (1936) which applied the Safety Appliance Act to railroads operated by the State. Justice Stone, as he then was, speaking for a unanimous Court, stated (297 U.S. at 183-185):

> "The state urges that it is not subject to the federal Safety Appliance Act. It is not denied that the omission charged would be a violation if by a privately-owned rail carrier in interstate commerce. But it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvement, is engaged in performing a public function in its sovereign capacity and for that

reason cannot constitutionally be subjected to the provisions of the federal Act.

"Despite reliance upon the point both by the government and the state, we think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution."

• • • •

"The federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances and to safeguard interstate commerce itself from obstruction and injury due to defective appliances upon locomotives and cars used on the highways of interstate commerce, even though their individual use is wholly intrastate. The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute." (Citations omitted.)

This language may easily and justly be put in terms applicable here, for it is entirely accurate to say that the Fair Labor Standards Act is remedial, that its purpose is to safeguard interstate commerce from disruption caused by substandard working conditions, and that this objective may be

subverted when the conditions occur in either a publicly-owned or a privately-owned school or hospital,

Subsequently, as we have just noted, there has been an unbroken line of decisions consistently applying these principles. *See e.g. California* v. *Taylor,* 353 U.S. 553 (1957); *California* v. *United States,* 320 U.S. 577 (1944); *Oklahoma* v. *Atkinson Co.,* 313 U.S. 508 (1941); *United States* v. *Ohio,* 385 U.S. 9 (1966), *reversing per curiam* 354 F2d 549 (6th Cir. 1965). Indeed, it is difficult to conceive of a case more clearly in point than *California* v. *Taylor,* which applied the Railway Labor Act to a state operated railroad thereby displacing state civil service regulations. In that case, the Court stated in a unanimous opinion (353 U.S. at 568):

> "Finally, the State suggests that Congress has no constitutional power to interfere with the 'sovereign right' of a State to control its employment relationships on a state-owned railroad engaged in interstate commerce. In United States v. California (US) supra, this Court said that the State, although acting in its sovereign capacity in operating this Belt Railroad, necessarily so acted 'in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government.'
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> "That principle is no less applicable here. If California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships."

The discussion thus far establishes that there is no implicit limitation inherent in the Commerce Clause itself which would bar the application of the Act to public schools and hospitals. It is equally plain that the decisions of this Court

demonstrate that the Tenth Amendment is of no avail to the Appellants here. In addition to the cases already noted, pp. 6-8 *supra*, the two authorities most squarely in point are *Case* v. *Bowles*, 327 U.S. 92 (1946) and *Oklahoma* v. *United States Civil Service Commission*, 330 U.S. 127 (1947). *Case* v. *Bowles* is a decision upholding the application of the Emergency Price Control Act, enacted pursuant to the War Power Clause, to sales by the State of Washington of timber grown on state land; the proceeds of said sales to go for the support of the public schools. In rejecting the state's Tenth Amendment argument, the Court stated (327 U.S. at 101-102):

> "The contention rests on the premise that there is a 'doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.' It is not contended, and could not be under our prior decisions, that the ceiling price fixed by the Administrator is Constitutionally invalid as applied to privately owned timber. But it is argued that the Act cannot be applied to this sale because it was 'for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens.' Since the Emergency Price Control Act has been sustained as a Congressional exercise of the war power, the petitioner's argument is that the extent of that power as applied to state functions depends on whether these are 'essential' to the state government. The use of the same criterion in measuring the Constitutional power of Congress to tax has proved to be unworkable, and we reject it as a guide in the field here involved.
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> * * * * *
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> "Our only question is whether the state's power to make the sales must be in subordination to the power of Congress to fix maximum prices in order to carry on war. For reasons to which we have already adverted, an absence of federal power to fix maximum prices for

state sales or to control rents charged by a state might result in depriving Congress of ability effectively to prevent the evil of inflation at which the Act was aimed. The result would be that the Constitutional grant of the power to make war would be inadequate to accomplish its full purpose of the federal government's establishment.

"To construe the Constitution as preventing this would be to read it as a self-defeating charter. It has never been so interpreted. Since the decision in M'Culloch v. Maryland, 4 Wheat (US) 316, 420, it has seldom if ever been doubted that Congress has power in order to attain a legitimate end—that is, to accomplish the full purpose of a granted authority—to use all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution. And we have said, that the Tenth Amendment 'does not operate as a limitation upon the powers, express or implied, delegated to the National Government.'" (Citations omitted.)

In *Oklahoma* v. *Civil Service Commission,* the State challenged a determination by the Civil Service Commission made pursuant to Section 12(a) of the Hatch Act.[3] Section 12(a) provided, in essence that "no officer . . . of any State . . . agency whose principal employment is in connection with any activity which is financed in whole or in part by loan or grants made by the United States . . . shall . . . take any active part in political management or political campaigns." Section 12(b) provided that if the Commission after hearing determined that a violation of Section 12(a) had occurred, it might determine that the violation is such that it "warrants the removal of the officer" and provided further that "if the officer . . . has not been removed from his office . . . within thirty days after notice of [such] determination . . . the Commission . . .

[3] The present version of Section 12(a) is to be found at 5 U.S.C. §1502.

shall make . . . an order requiring [the withholding] from its loans or grants . . . [of] an amount equal to two years' compensation at the rate such officer . . . was receiving at the time of such violation." After a hearing, the Commission determined that an Oklahoma Highway Commissioner had violated Section 12(a) and that the violation warranted his removal. The State instituted review proceedings in the Federal Courts, and those proceedings ended in a determination by this Court upholding the Commission's action and rejecting the State's Tenth Amendment claim (330 U.S. at 142, 143):

> "Petitioner's chief reliance for its contention that §12(a) of the Hatch Act is unconstitutional as applied to Oklahoma in this proceeding is that the so-called penalty provisions invade the sovereignty of a state in such a way as to violate the Tenth Amendment by providing for 'possible forfeiture of state office or alternative penalties against the state.'
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> • • • •
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> "While the United States is not concerned and has no power to regulate local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to state shall be disbursed.
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> "The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case. As pointed out in United States v. Darby, 321 U.S. 100, 124, the Tenth Amendment has been consistently construed 'as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.' The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activities within the state, it has never been thought that such effect made the federal act invalid."

We submit that the cases just cited demonstrate that the concept of federalism set out in the Constitution provides for the resolution of the occasional clash of sovereignties which is inherent in a federal system by subordinating *all* state enactments, which are inconsistent and incompatible with a federal enactment passed by Congress, pursuant to a plenary authority granted to it, to the paramount federal law. This conclusion is the only one which gives proper scope to the Supremacy Clause. The Appellants here, nevertheless, argue (Appellants' Br. 24, 46-56) that state legislation governing the employment relationship between the State and those whom it employs to render "nonprofit," "purely governmental" and "economically marginal" services is not subject to the full force of the Supremacy and Commerce Clauses. This argument is untenable.

The necessary implication of the Appellants' argument is that our constitutional system recognizes two forms of state sovereignty, which are different in kind. The first is a form which is manifested in enactments governing the State's private citizens and state activities which are not "essentially governmental." This form of sovereignty Appellants' concede to be subject to displacement by superior federal law. The second, and "higher," form of sovereignty includes state laws regulating matters which are "essentially governmental" and despite the Supremacy Clause the Appellants' claim that such laws are not subject to otherwise plenary federal authority. The primary difficulty with this position is that it finds no support in the provisions of the Constitution. Plainly, under *Case* v. *Bowles* and *Oklahoma* v. *Civil Service Commission,* this argument cannot be based on the Tenth Amendment. It is just as plain that given the decision in *United States* v. *California* and *California* v. *Taylor,* there can be no doubt that this Court has rejected the notion there are limita-

tions on the plenary powers of Congress which are implicit in the general concepts of federalism. Equally there can be no doubt that this Court's decisions in cases such as *Cramp* v. *Board of Instruction*, 368 U.S. 278 (1961) and *Weiman* v. *Updegraff* 344 U.S. 183 (1952) have put to rest the belief that the States have a complete and unfettered discretion in dealing with their employees, which is not subject to the overriding authority of the Constitution.

Moreover, we submit that Appellants' argument that laws which set wages for state blue collar employees employed in hospitals and schools are of a higher order of importance than state laws setting a minimum wage for employees of private enterprises within its jurisdiction runs counter to practical experience. For the latter may well embody a solution to a local problem every bit as profound as the economical management of a state-run enterprise. For example, in the absence of federal legislation, a particular state may choose a minimum wage law providing for only 75 cents an hour, when other states have set a higher figure, as a potent mechanism for attracting industry and thereby increasing the public good. But after Congress enters the field such a law would have no force or effect no matter what prompted it.

The Appellants' position suffers from at least two other critical defects as well. The first is that there is simply no support for the contention (Appellants' Br. 28-29) that application of the Act would strike "at the heart of state government." The effect of the Act here is exactly the same as the impact of the legislation upheld in *Case* v. *Bowles* on the State's educational establishment. Both enactments require the affected State to raise more money from taxes or other sources to finance educational services. And turning from the effect of the Act to the focus of the federal concern which prompted it, there can be no doubt that this

enactment is far less intrusive on the mechanics of state government than were the statutes upheld in *California* v. *Taylor* and *Oklahoma* v. *Civil Service Commission*. For here, Congress has dealt only with the cash nexus between employer and employee while the former completely displaced the State's civil service law and the latter placed limitations on the free exercise of political activity by state officials. Equally unproven is Appellants' contention (Appellants' Br. 34-38, 67-68) that the validation of the Act would remove all limitations on the commerce power and necessarily lead to the conclusion that Congress can set the wages and working conditions of state judges, executives and legislators. It is true that inherent in our position is the proposition that there is no bright line indicating the exact limits of Congress's commerce powers. This, however, does not mean that our position leads ineluctably to the conclusion that these powers are unlimited. For we believe that there are limitations on Congress inherent in the Commerce and Necessary and Proper Clauses. Those limitations cannot, however, be divined through abstract formulations, rather they must be developed through a process of litigating elucidation which looks to practical realities. And when this procedure is followed the validity of the Act here is apparent. For, as this Court has recognized, it is perfectly rational for Congress to have determined that failure to ameliorate the harsh working conditions of certain blue collar employees who work for the States or their local subdivisions might well lead to work stoppages which would tend to obstruct the free flow of interstate commerce. The fact that this is so does not mean that the same argument would necessarily provide a rational predicate for similar regulations covering high state officials. That is a question for the future, and the resolution of this case in favor of the Government would

not, we submit, be controlling when it arises, it ■ should ever arise.

CONCLUSION

The structure of this brief has been dictated by our firm belief that this case does nothing more than raise issues which have been set to rest by the decisions of this Court in cases which cannot rationally be distinguished from the situation presented here. We submit that the foregoing argument substantiates our view and that on the basis of the precedents we cite, this Court should decide in favor of the Government.

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